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No. 25, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE STATE OF KANSAS, COMPLAINANT,

v.

THE UNITED STATES ET AL., DEFENDANTS.

SUGGESTIONS ON BEHALF OF THE UNITED STATES IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE.

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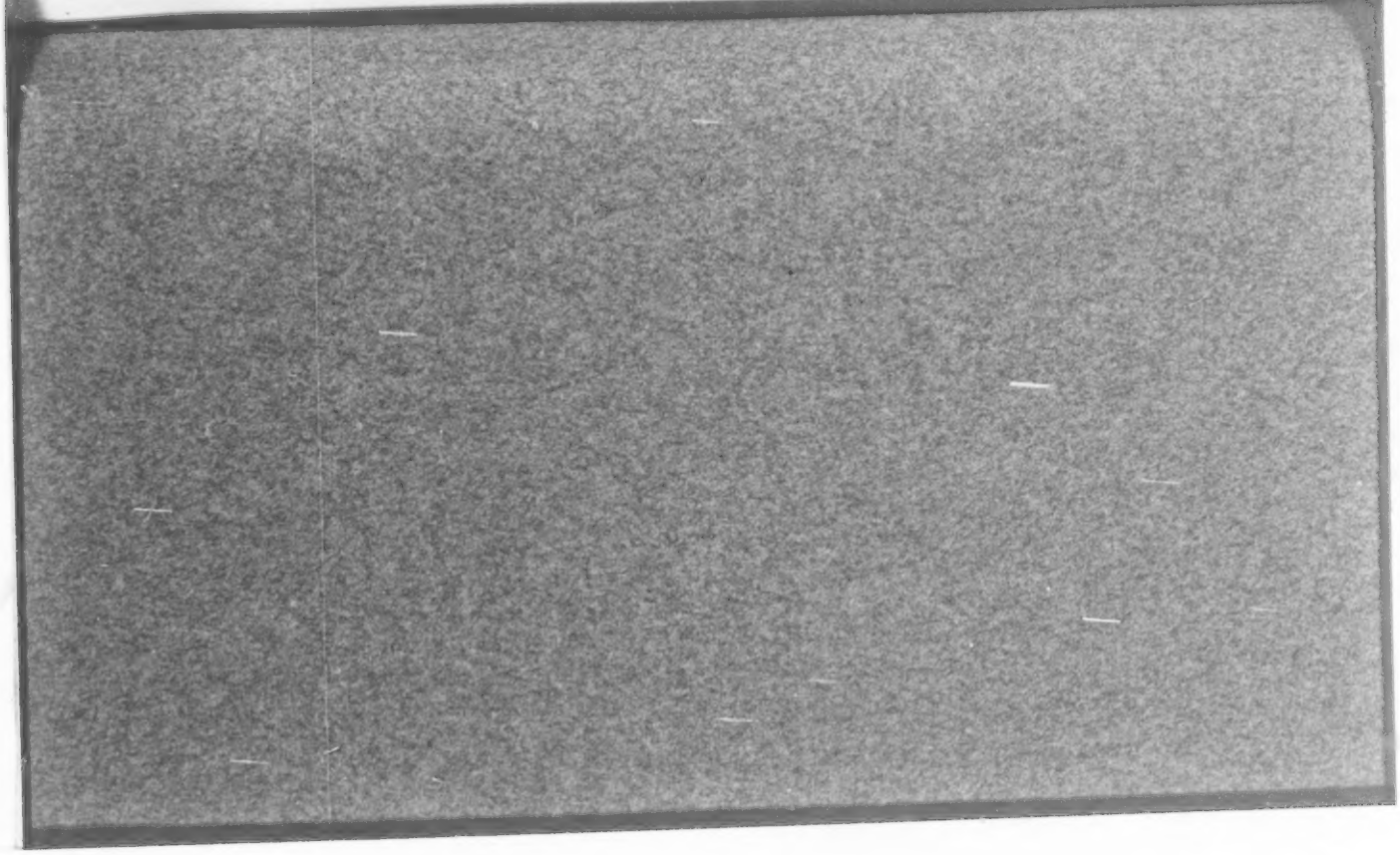

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There are precedents for interposing objections at this time. (*In re Baez*, 177 U. S., 378; *In re Vidal*, 179 U. S., 126; *In re Oli Nifou*, 198 U. S., 581.)

Leave is asked by the attorney-general of Kansas to file a bill on behalf of the State as trustee for the Missouri, Kansas and Texas Railway Company of certain lands alleged to have been granted to the State to aid in the construction of railroad and telegraph lines.

The acts of Congress granting the lands in question (Bill of Complaint, pp. 21 to 33) provide, sections 1:

> That for the purpose of aiding the * * * Railroad Company * * * to construct and operate a railroad * * * there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated

> by odd numbers * * * *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act. * * *
>
> SEC. 9. *And be it further enacted*, That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the *public lands* of the United States.

The bill alleges that the road was properly constructed through the Indian Territory (p. 64), and sets out at length Indian treaties and Congressional legislation with reference to that Territory, under which it is alleged that the Creek Indian Nation has ceased to occupy or claim the same as a tribe or nation, that some of the lands have been allotted in severalty to individual members of that nation (p. 122), and that said lands thereby became a part of the public lands of the United States and passed to the State under the provisions of the grants above mentioned.

A decree is therefore asked adjudging that the State is the owner as trustee for the railway company of all odd-numbered sections of land to the extent of ten sections per mile along the line of its road through

the Creek Nation, and that the allottees be decreed to surrender possession to the State as trustee and be enjoined from disposing of said lands (p. 160), or "in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy" and the United States adjudged to pay to the State as trustee the sum of such values (p. 161), estimated at more than $10,000,000 (p. 159).

I.

It does not appear that the attorney-general for the State of Kansas has any authority to institute the contemplated suit.

It is submitted that the attorney-general of a State has no right to bring an action in its behalf unless so authorized by an act of the legislature of the State or by direction of its governor. (See *Texas* v. *White*, 7 Wall., 700, 718–719.)

II.

The proposed suit is not one of which this court has original jurisdiction.

That jurisdiction is limited to two classes of cases:

(*a*) Those which affect ambassadors, other public ministers, and consuls; and

(*b*) Those in which a state shall be a party (Constitution, Article III, section 2), subject to limitations of Amendment XI.

The State of Kansas has no substantial interest in the subject-matter and is but nominally the complainant, the real party in interest being the railway company, as appears upon the face of the bill.

By the terms of the granting act the legal title passed to the railroad company, if at all, upon the construction of the road.

The granting acts provide (bill, p. 30):

> SEC. 3. * * * And the lands hereby granted shall inure to the benefit of the said company, as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed * * * then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named.

Grants containing such provisions as this or made directly to the railroad vest title in the company upon the performance of their conditions. (*Wisconsin Railroad Company* v. *Price County*, 133 U. S., 496, 511; *Van Wyck* v. *Knevals*, 106 U. S., 360, 365; *Sioux City, etc., Railroad* v. *United States*, 159 U. S., 349, 364; *Deseret Salt Company* v. *Torpey*, 142 U. S., 241.) If, on the other hand, patents are to issue to the State, then its character as a trustee attaches. (*Sioux City, etc., Railroad* v. *United States, supra.*) The State is not interested in the construction of a road beyond its boundaries and Congress did not intend to grant to it lands for that purpose.

In formal communications and protests by it to the

Dawes Commission, the town-site commission, the Indian agent, and the Secretary of the Interior, the tracts in question have been claimed by the railway company invariably heretofore as its own, without reference to any interest of the State therein. (Bill, pp. 111, 131, 138, 143, 149.)

Of the counsel for the State one at least belongs to the legal department of the railway company. (Bill, pp. 137, 143, 149, 154.)

Apparently the proceeding is under the control of the railroad company and the name of the State is used simply for the purpose of prosecuting the claim of the company to the lands in question and as a collecting agent for it if the value thereof could be recovered against the United States. Doubtless the expense of the action is to be borne by the railroad.

Under such circumstances it is well settled that this court does not possess original jurisdiction of suits by a State.

Thus, in the case of *New Hampshire* v. *Louisiana* (108 U. S., 76) the State of New Hampshire, under an act of its legislature authorizing such assignments and suits, sought to bring an original suit as assignee of valid obligations on the part of Louisiana. All expenses were to be paid by the assignor and the amount recovered by the attorney-general of the State as *special trustee* and turned over to the assignor of the bonds after deducting expenses. This court held that the bondholders and not the State of New Hampshire were the real parties in interest, and that therefore it did not have original jurisdiction.

III.

This would not be a suit by a State against citizens of another *State*, nor one in which the United States, the real party in interest as defendant, has consented to be sued.

The authority of this court to entertain original jurisdiction of a suit instituted by a State is limited to three classes:

(*a*) Where another *State* is a party defendant.

(*b*) Where citizens of another *State* are defendants.

All parties defendant other than the United States and its officers are citizens of the Indian Territory and it is submitted that therefore they can not be sued originally by a State in this court.

It is settled that a Territory is not a State in the sense in which that term is used in the Constitution, and that a suit by a citizen of a Territory can not be maintained under that provision of the Constitution declaring that the jurisdiction of the courts of the United States shall extend "to controversies between citizens of different States." (*Corporation of New Orleans* v. *Winter*, 1 Wheat., 92; *Downes* v. *Bidwell*, 182 U. S., 244, 259.)

(*c*) Where the United States is the real party in interest and has consented to be sued therein.

> The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 387; *Oregon* v. *Hitchcock*, No. 16, original, decided April 23, 1906.)

In this case the only parties defendant other than the United States and its officers are Creek Indian allottees, and if their allotments should be taken from them, which is a part of the relief sought by the bill, the United States would be subject, under acts of Congress and its agreements with them, to a demand from them for the value thereof or for other lands. (30 Stats. L., 505.)

The alternative relief sought is entirely against the United States, as follows:

> Or in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendant, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values.

The United States is therefore the real party in interest as defendant. It has not consented to be sued, and of course can not be sued without its consent. (*Minnesota* v. *Hitchcock*, and *Oregon* v. *Hitchcock*, *supra*; *United States* v. *Lee*, 106 U. S., 196, 207; *Taylor on Jurisdiction of Supreme Court*, p. 63.)

Jurisdictional qualities must exist as to all parties in order to confer jurisdiction. (*Great Southern Hotel Company* v. *Jones*, 177 U. S., 449.) Therefore, being without jurisdiction as to the United States, there is no jurisdiction of any of the parties.

IV.

It does not appear that all the lands in controversy have been allotted. That the courts will not interfere with the land department in the disposal of land so long as the title in any sense remains in the United States is well settled. (*Bockfinger* v. *Foster*, 190 U. S., 116; *Oregon* v. *Hitchcock*, *supra.*)

V.

It is submitted that the grants in question were intended to embrace public land only, that is, land which at the taking effect of the grant was subject to disposition under the general land laws. (*Newhall* v. *Sanger*, 92 U. S., 761.)

In *Leavenworth, etc., R. R.* v. *United States* (92 U. S., 733) it was held that where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same is assured by treaty, a grant of "land" in general terms will not be construed to embrace them.

It appears from the bill that the lands were not only burdened with an Indian right of occupancy secured to them by treaty, but that the Indians were in possession by virtue of a patent theretofore issued to their tribal nation by the United States.

It is respectfully submitted that permission to file the bill should not be granted.

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Attorney-General.
HENRY M. HOYT,
Solicitor-General.

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